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RE KASIAH KASBAH, EX P SIME BANK BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[BANKRUPTCY NO: 29-121-1997]
27 JANUARY 2003

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BANKRUPTCY: *Notice - Validity - Whether wrong spelling of name of judgment debtor invalidated proceedings - Whether court had power to amend such irregularities - Whether judgment could be challenged in a collateral proceeding - Bankruptcy Act 1967, s. 131 - Bankruptcy Rules 1969, r. 274*

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This was an appeal by the judgment debtor ('JD') against the order of the learned deputy registrar allowing, with costs to be borne by the judgment creditor ('JC'), the JC's application in encl. 37 in the following terms: (1) to correct the spelling in the name of the JD herein from Kasiah bt Kasbah to Kasiah bt Kasban; (2) the JD's correct name to be incorporated in the

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bankruptcy notice and the creditor's petition, and all the cause papers in this bankruptcy action; all proceedings and service of all cause papers on the JD to be deemed to be valid and correct; and (4) all cause papers to this application to show the JD's correct name. The JD contended that the bankruptcy notice was null and void, and that the JC failed to comply strictly with the law

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concerning bankruptcy proceedings. The JC, however, submitted that the court, pursuant to s. 131 of the Bankruptcy Act 1967 and r. 274 of the Bankruptcy Rules 1969, had the power to amend such terms as the court thinks fit, and that an irregularity should not invalidate bankruptcy proceedings.

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Held:

[1] The JD was the very person who was described as Kasiah bt Kasbah when the correct spelling should have been Kasiah bt Kasban. The spelling error was truly a matter of triviality, in which case it was eminently suitable to apply the time honoured maxim *de minimis non curat lex*. Further, no

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objection had been raised by the JD as to the said spelling error in all proceedings prior to encl. 37 herein. (p 471 h)

[2] The learned registrar held that the JD's challenge to the bankruptcy notice and the unamended judgment, originally dated 21 January 1988 but

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amended by consent of the JD and the JC to the correct date of 21 January 1987, could not be raised as the application before her was for leave to amend a spelling error in the JD's name. This was a challenge to a judgment by way of a collateral proceeding, and therefore should not be allowed. (p 472 f)

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[3] The JC should not be refused leave to amend the name of the JD to reflect the correct spelling and to allow the true picture to be presented in court. The learned registrar had correctly held that the JD had suffered no substantial injustice which could not be remedied by an order of the court, by ordering costs to be paid by the JC in favour of the JD, which was a proper order in the circumstances of the case. (p 474 h)

[Appeal dismissed.]

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(foll)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd [1996] 4 MLJ 271 HC ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 FC ***(foll)***

Hong Chang Hwa v. Tong Chang Fook [2003] 1 CLJ 147 HC ***(refd)***

Kamaruddin Mohamed v. United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 ***(refd)***

Re Samuel Pakianathan Jabamanickam, ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 HC ***(refd)***

Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Hj Mohd Hashim [2000] 2 CLJ 535 HC ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***

Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 HC ***(refd)***

Sovereign General Insurance Sdn Bhd v. Koh Tian Ee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Wee Chow Yong, ex p Public Finance Bhd [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349 HC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 131

Bankruptcy Rules 1969, rr. 94(1)(aa), 274

Rules of the High Court 1980, O. 20 r. 5(1)

For the judgment debtor - Yau Jiok Hua; M/s Yau Jiok Hua & Co

For the judgment creditor - Karen Cheah Yee Lynn; M/s Ong Kok Bin & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (47) by the judgment debtor (JD) against the order of the learned registrar who had on 4 April 2002 allowed, with costs to be borne by the judgment creditor (JC), the JC's application in encl. (37) in the following terms:

(1) to correct the spelling in the name of the JD herein from Kasiah bt Kasbah to Kasiah bt Kasban;

(2) the JD's correct name be incorporated in the bankruptcy notice dated 12 May 1997 and creditor's petition dated 11 June 1998 and all the cause papers in this bankruptcy action;

(3) all proceedings and service of all cause papers on the JD be deemed to be valid and correct; and

(4) all cause papers subsequent to this application to show the JD's correct name.

Submission For JD

En Yau Jiok Hua, learned counsel for JD, submitted that the factual basis given in encl. (37) that the spelling of the JD's name was a typing error is not true and that the name of the JD in the bankruptcy proceedings herein had been derived from the judgment attached to the request for issue of bankruptcy notice dated 12 May 1997.

He added that when the bankruptcy notice was issued on 12 May 1997, the JC did not have a judgment on which he could issue execution, and that the judgment which formed the basis of the bankruptcy notice herein was on 24 January 2002 amended by correcting the name of the JD and the date of the judgment. He stressed that the amendment to the judgment clearly demonstrated that on the date of issue of the bankruptcy notice herein, there was no judgment on which the JC was in a position to issue execution and that the bankruptcy notice was null and void, in which case there was nothing before the court that can be amended and in his view the aforesaid prayers 1 and 2 were misconceived.

He also argued that in the bankruptcy proceedings strict compliance with the law is required, relying on *Sobri bin Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756; and *Wee Chow Yong t/a Vienna Music Centre, ex p Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ

(Rep) 349, and that the amended judgment was significant in that it straightaway rendered the order dated 20 November 1996 granting leave to issue execution under O. 46 r. 2 of the Rules of the High Court 1980 useless because that order only granted leave to issue on the unamended judgment.

These submissions were not upheld by the learned registrar.

Contention For JC

Cik Karen Cheah Yee Lynn, learned counsel for the JC, relied on s. 131 of the Bankruptcy Act 1967 and r. 274 of the Bankruptcy Rules 1969 pertaining to the power of the court to amend on such terms as the court thinks fit and that an irregularity shall not invalidate bankruptcy proceedings.

She added that there was no substantial injustice to the JD as the JD has at all times confirmed her identity, in which case estoppel operates against her and that the JD's submission pertaining to the invalidity of the bankruptcy notice is baseless.

Decision Of The Court

Factual Background

Before I proceed to deal with the law governing the JD's application in encl. (37), I shall first deal with the factual background thereto.

It is an established fact that the JD has at all material times from 1999 attended all court proceedings before and after the issue of the bankruptcy notice in the name of Kasiah bt Kasbah as her name although it has been wrongly spelt and the spelling error "h" which should have been "n" is now the subject matter of the proposed amendment. In all her affidavits, she has acknowledged that she was the JD who has never disputed her own national registration identity card (NRIC) number stated in all the cause papers filed in the bankruptcy proceedings. In this regard, this doctrine of estoppel shall, in my view, operate against the JD: *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 (FC).

Spelling Error

There is no doubt in my mind that the JD is the very person who was described as Kasiah bt Kasbah when the correct spelling should have been Kasiah bt Kasban. The spelling error is, in my view, truly a matter of triviality, in which case it is eminently suitable to apply the time honoured maxim *de minimis non curat lex*. Further, no objection has ever been raised by the JD as to the said spelling error in all proceedings prior to encl. (37) herein.

In *Re Sharma Kumari Shukla; ex p Dato' Abdullah Hishan bin Hj Mohd Hashim* [2000] 5 MLJ 430, which the learned registrar cited in her grounds of decision, the judgment debtor's name in the bankruptcy notice was Sharma Kumari Shukla while that in the judgment debtor's NRIC was Sharma Kumari a/p Oam Parkash. However, the NRIC number in the bankruptcy notice is the same number in the judgment debtor's NRIC. Be that as it may, the judgment debtor applied to set aside the bankruptcy notice on the ground that it was bad in law as it had not stated the name as found in the NRIC, and that there was non-compliance with r. 94(1)(aa) of the Bankruptcy Rules 1969, which provides that every bankruptcy notice shall be endorsed with the name and NRIC number of the debtor. Kamalanathan Ratnam J had no difficulty in holding, *inter alia*, that so long as the judgment debtor has been properly identified as the person in the NRIC and so long as the judgment debtor has affirmed an affidavit acknowledging the address, there would be sufficient compliance with r. 94(1)(aa).

By way of comparison, the spelling error manifested in the name of the JD herein is minuscule in relation to the substantial and striking difference in the two names in the aforesaid appeal before Kamalanathan Ratnam J. In my view, the underlying principle is whether the two names are indeed referring to one and the same person. The answer in this appeal is absolutely in the affirmative and the learned registrar is correct in her finding in this regard.

Challenge To Bankruptcy Notice And Unamended Judgment

On this issue, learned registrar held that the JD's challenge to the bankruptcy notice and the unamended judgment, originally dated 21 January 1988 but amended by consent of the JD and JC to the correct date 21 January 1987, cannot be raised as the application before her is for leave to amend a spelling error in the JD's name. This is in my view a challenge to a judgment by way of collateral proceedings for leave to amend the spelling in the JD's name.

The principle enunciated by the Supreme Court in *Sovereign General Insurance Sdn Bhd v. Koh Tian Ee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 that in the exercise of his jurisdiction in bankruptcy proceedings, the judge cannot go behind the judgment has been correctly applied by the learned registrar.

In *Hong Chang Hwa v. Tong Chang Fook* [2003] 1 CLJ 147 I have the occasion to decide on the issue as to whether a judgment may be challenged in a collateral proceeding and I gave the answer in the negative.

Amendment And Irregularity

Rule 274 of the Bankruptcy Rules 1969 provides for the effect of non-compliance with the Rules in the following words:

274. Effect of non-compliance with Rules

Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

Rule 274 therefore allows, *inter alia*, non-compliance with the Rules or with any rule of practice by eg, directing any bankruptcy proceedings to be amended on such terms as the court may think fit.

In the exercise of the discretion as to whether or not to allow an amendment of eg, the spelling error herein under r. 274 of the Bankruptcy Rules 1969, I am of the view that the governing principles are analogous to those applicable in relation to the grant or refusal of leave to amend a party's pleading under O. 20 r. 5(1) of the Rules of the High Court 1980 as enunciated by the Federal Court in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 which was followed by the Court of Appeal in *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361 and by the Federal Court in *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126.

I would restate the governing principles *mutatis mutandis* as follows:

The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (a) whether the application was *bona fide* (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the bankruptcy proceeding from one character into a bankruptcy proceeding of another and inconsistent character.

In addition, s. 131 of the Bankruptcy Act 1967, which says that a defect shall not invalidate bankruptcy proceedings, is reproduced as follows:

131. Formal defect not to invalidate proceedings.

No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

(see *Re Samuel Pakianathan a/l Jabamanickam, ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737 (HC); *Kamaruddin bin Mohamed v. United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126).

Cases Cited For JD

The cases cited for the JD would require a more detailed treatment here. In this appeal to me as judge in chambers, it is settled law that this is by way of actual rehearing: *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 (FC); *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271; *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716.

While I agree with the submission for the JD that strict compliance with the law is required in bankruptcy proceedings, I am not very positive if *Sobri, supra* and *Wee Chow Yong, supra*, upon which the JD relied, could offer any assistance to the JD in this appeal against the said amendment, as both these cases before Edgar Joseph Jr J (later FCJ) were not decided on the grant or refusal of leave to amend the name of JD.

Sobri, supra, was decided on the basis that the affidavit verifying the creditor's petition was affirmed one day before the date of the creditor's petition, as a result of which his Lordship held the creditor's petition to be invalid. The challenge was raised for the JD at the hearing of the creditor's petition, but not at the hearing of the application for amendment as there was no such application.

In *Wee Chow Yong, supra*, the JD's application to impugn the bankruptcy notice was founded on the grounds that it was based on a judgment which came into existence on 13 May 1982, when the bankruptcy notice was issued on 12 May 1988 and served on the judgment debtor on 19 June 1988, which was more than six years without leave of the court under O. 46 r. 2 of the Rules of the High Court 1980. It was also submitted for the judgment debtor that the bankruptcy notice included penal interest and that the schedule to the bankruptcy notice did not specify the exact amount of interest due. Another ground was that it was not shown that the solicitor who issued the bankruptcy notice had the authority to do so. All these grounds were not sustained by his Lordship who then dismissed the judgment debtor's application to set aside the bankruptcy notice.

On the aforesaid analysis, I hold that those cases were unhelpful to the JD.

Decision On Appeal

In my view, the JC should not be refused leave to amend the name of the JD to reflect the correct spelling and to allow the true picture to be presented in court. The learned registrar has correctly held that the JD has suffered no substantial injustice which cannot be remedied by an order of the court, by ordering costs to be paid by the JC in favour of the JD, which in my view is a proper order in the circumstances of the case.

I hold that the learned registrar has correctly exercised her discretion by reference to establish judicial principles. I therefore hereby affirm the above order granting leave to amend. The appeal is therefore dismissed. Parties to bear their own costs in this appeal.